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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 3 of the	)	
Cable Television Consumer Protection	)	MM Docket No. 92-262
and Competition Act of 1992	)	
	)	
Tier Buy-Through Prohibitions	)	

To: The Commission

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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Introduction and Summary

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rule Making ("Notice")[1/] in the above-captioned proceeding.

The Commission seeks comment on, *inter alia*, the applicability of the buy-through prohibitions to systems that offer program services on an *a la carte* basis.[2/] The most appropriate policy response is also the simplest. So long as all subscribers have access to programming offered on a per channel or per program basis without being required to purchase an intermediate tier of programming, the marketing of *a la carte*

[1/] In the Matter of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Tier Buy-Through Prohibitions, MM Docket No. 92-262, FCC-92-540 (rel. Dec. 11, 1992).

[2/] Notice at ¶ 8.

services should be at the operator's discretion. The offering of "multiple channel discounts" for services that are accessible individually to all subscribers does not constitute "price discrimination" against a subscriber who chooses to buy a single programming service; the statute does not guarantee subscribers the right to purchase an *a la carte* service at the "lowest unit charge." Nor would the offering of such discounts constitute the establishment of a buy-through requirement by establishing a "condition" on access to services at the lower price.

The regulations implementing the buy-through prohibitions should also clarify that the statute permits operators to offer subscribers of intermediate tiers of service reasonable discounts for per channel or per program offerings.

The Commission seeks comment on what "other technological limitations" (in addition to the lack of addressable converter boxes) would excuse cable systems from complying with the buy-through prohibitions.[3/] Because compliance with the buy-through prohibitions by addressable systems without dual-output converters will disable the advanced features of consumer electronics equipment, the Commission should exempt addressable systems from the buy-through prohibitions at least until the rules governing equipment compatibility have become effective. The Commission should also define "other limitations" to include systems that offer basic service over a cable network separate

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[3/] Id. at ¶ 5.

from the network utilized to deliver services offered on a per channel or per program basis.

I. The Buy-Through Prohibitions Do Not Restrict the Packaging and Pricing of Services Offered On An *A La Carte* Basis

The "buy-through" prohibitions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act" or "Act")[4/] are intended "to foster the ability of subscribers to choose freely among available programming services"[5/] by restricting program packaging practices that force subscribers to subscribe to programming they do not want.[6/]

In drafting the buy-through prohibitions, Congress intended to proscribe a specific cable program distribution practice: forcing subscribers to purchase tiers of service, in addition to a basic service tier, before permitting them to purchase premium programming. The provision was adopted in response to evidence that certain cable systems required the purchase of intermediate tiers of service as a condition to purchasing premium programming, or offered steep discounts for such programming only to those subscribers who purchased the intermediate tiers of service.

[4/] Pub. L. No. 102-385, 106 Stat. 1460, 1467 (1992). The buy-through prohibitions are codified at 47 U.S.C. § 543(b)(8).

[5/] Notice at ¶ 3.

[6/] The Act bars a cable operator from requiring subscribers to purchase any tier of service, other than the basic service tier, as a condition of access to video programming offered on a per channel or per program basis. Operators are also prohibited from discriminating between subscribers to the basic tier and subscribers of other tiers with regard to the rates charged for per program or per channel offerings. 47 U.S.C. § 543(b)(8)(A).

Congress found such "bundling" of programming to be harmful both to consumers and to competition among program services. The harm to consumers is readily apparent: they must pay for programming they do not want in order to obtain access to desired programming.[7/] In the near term, Congress sought to redress these harms by enacting the buy-through prohibitions. Congress recognized, however, that the long run solution to the buy-through problem is the provision of program services on an *a la carte* basis, with subscribers free to choose only the services they want.[8/]

Cablevision has long advocated policies that would permit cable operators to offer program services on an *a la carte* basis.[9/] Several years ago, Cablevision divided the traditional "expanded basic" tier into several smaller "interest segments." Subscribers could choose from among these segments (such as children's programming, arts and music, movies and entertainment, sports, and news and information) to fit their viewing preferences and budgets. In rebuilt systems, Cablevision is now moving even closer to the *a la carte* offering of programming services. From among a menu of nine services, such

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[7/] See S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991) ("Senate Report").

[8/] Senate Report at 77; H.R. Rep. No. 628, 102d Cong., 2d Sess. 90 (1992) ("House Report").

[9/] See Comments of Cablevision Systems Corporation, In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600 (filed Mar. 1, 1990).

as Comedy Central and Sci-Fi Channel, subscribers on these systems will be able to choose any five offerings.

Cablevision is pursuing a strategy of unbundling services because it empowers subscribers to choose from among competing programming services, and allows them to assemble their own "customized" program packages from among many possibilities. Unbundling also leads to greater competition among programming services and, ultimately, will reduce upward pressure on subscriber rates.[10/]

The Notice suggests that "multiple channel discounts"[11/] for the offering of *a la carte* services could conflict with the buy-through prohibitions.[12/] Nothing in the language or the legislative history of the prohibitions, however, suggests any intent to restrict the pricing options available to operators for such services. Multiple channel discounts are permissible so long as no subscriber is forced to purchase an intermediate tier of service in order to obtain access to the *a la carte* services. The subscriber who chooses not to take advantage of the discount by purchasing multiple services is not the victim of price discrimination. The statute does not compel operators, in

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[10/] See Senate Report at 77 ("[w]ith bundling, programmers have an incentive to spend more (for example, for certain types of sports programming) knowing that the cost will be spread across those who do not watch such programming").

[11/] Under a "multiple channel discount," an operator might offer one channel of programming for $5.00, a second channel for $4.00, and additional channels for $3.00 each. See Notice at ¶ 8, n.7.

[12/] Notice at ¶ 8.

effect, to make per channel or per program services available to subscribers at the "lowest unit charge" regardless of the number of such services that a subscriber purchases.[13/]

Antitrust law regarding price discrimination illustrates the distinction between improper price discrimination and legitimate discount practices. Under the Robinson-Patman Act, it is unlawful to discriminate in price between purchasers of goods of like grade and quality, where the effect may be to substantially lessen competition or to tend to create a monopoly.[14/] The courts have recognized, however, that the Robinson-Patman Act does not proscribe the offering of two prices, including one that is discounted when certain conditions are met, so long as the

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[13/] Cf. 47 U.S.C. § 315(b) (expressly guaranteeing candidates the use of any broadcasting station at the "lowest unit charge" during specified time periods).

The requirement that a subscriber purchase two (or more) *a la carte* services in order to obtain the lowest rate on the succeeding services cannot be said to constitute a buy-through requirement, under which access to the succeeding services is "conditioned" on the purchase of the first two. So long as the basic tier subscriber has direct access to programming offered on a per channel or per program basis, at non-discriminatory prices, the buy-through prohibitions are satisfied. Legitimate multiple channel discounts do not constitute a condition on access to programming, and are not barred by the Act. See pp. 6-8, infra. In any event, packages of *a la carte* services are outside the scope of the rate regulation provisions of the Act. 47 U.S.C. §543(k) (defining "cable programming service" to exclude programming offered on a per channel or per program basis). Cf. In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, FCC 92-544 (rel. Dec. 24, 1992), at ¶ 96 (suggesting that packages of premium services also available individually would be exempt from rate regulation).

[14/] 15 U.S.C. § 13(a). See generally Texaco, Inc. v. Hasbrouck, 110 S. Ct. 2535, 2542-43 (1990) (describing the basic elements to a Robinson-Patman Act claim).

discounted price is realistically available to all customers.[15/] Relying on this so-called "availability" exception to Robinson-Patman Act liability, courts have sanctioned price differences attributable to, *inter alia*, quantity discounts[16/] and creditworthiness.[17/]

In the context of the Cable Act, a discount based on the purchase of specified or unspecified per program or per channel services would be permissible if the cable system permitted its subscribers to purchase any individual per program or per channel service on an *a la carte* basis and if the discount were available to all subscribers. Under those conditions, price discounting would not constitute price discrimination under the Act.

While it is conceivable that a cable system could attempt to structure multiple channel discounts to force the purchase of a package of services along with a per channel or per program

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[15/] See, e.g., Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1326 (6th Cir. 1983) ("The practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers."); see also Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1130 (D.C. Cir. 1988); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1024-25 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977); Tri-Valley Packing Association v. FTC, 329 F.2d 694, 703-04 (9th Cir. 1964).

[16/] See, e.g., Bruce's Juices v. American Can Co., 330 U.S. 743, 744-46 (1947) ("Quantity discounts are among the oldest, most widely employed and best known of discount practices. . . . Congress refused to declare flatly that they are illegal.")

[17/] Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d at 1325 ("[The Robinson-Patman Act] is not violated when the credit decisions are based upon legitimate business reasons.").

offering,[18] the buy-through prohibitions would be satisfied if access to that service were not conditioned on the purchase of the package. In any event, the prohibition on evasions of the statute's rate regulation requirements[19] empowers the Commission to redress efforts to circumvent the buy-through prohibitions.

II. Cable Operators Should Be Permitted to Offer Reasonable Discounts to Subscribers Who Purchase Intermediate Tiers of Service

Because price discounting often offers consumer and competitive benefits, the Commission's implementing regulations should, as a general matter, permit operators to offer subscribers of intermediate tiers of service reasonable discounts for per channel or per program offerings. Courts have often approved of reasonable discounts, notwithstanding the literal terms of a statute otherwise prohibiting them.[20]

The antitrust laws provide ample precedent for construing the Act's prohibition on discrimination to proscribe only pricing schemes that constitute "unreasonable" discrimination. The

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[18] For example, a system might offer HBO alone at a price of $30 per month and HBO in conjunction with 15 other program services at a price of $35 per month.

[19] 47 U.S.C. § 543(h).

[20] As one court explained the "availability" exception to Robinson-Patman Act liability, "[w]here a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury." Shreve Equipment, Inc. v. Clay Equipment Corp., 650 F.2d 101, 105 (6th Cir.), cert. denied, 454 U.S. 897 (1981) (citations omitted).

seemingly boundless mandate of the Sherman Act, holding that "every" contract, combination, or conspiracy that restrains interstate or foreign commerce is illegal,[21] was long ago interpreted far more narrowly to reach only agreements that "unreasonably" restrain trade.[22]

The Commission should similarly construe the 1992 Cable Act to proscribe only "unreasonable" price discrimination. The Commission's regulations should permit the offering of a reasonable discount to those subscribers who purchase a premium program service, such as HBO, if they purchase an additional specified tier or package of programming. A reasonable discount benefits those subscribers who wish to subscribe to a broader range of programming without burdening those who wish to subscribe only to the basic service tier and a per program or per channel service.

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[21] 15 U.S.C. § 1; see also Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (recognizing that a literal reading of the statute would invalidate every contract because "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence").

[22] See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911).

III. The Commission Must Resolve the Apparent Conflict Between the Act's Buy-Through and Equipment Compatibility Provisions and Define "Technological Limitations" to Include "Dual Cable" Systems

A. The Commission Must Address the Conflict Between the Buy-Through Prohibitions and the Act's Equipment Compatibility Requirement

Congress recognized that approximately three quarters of all cable systems are presently unable to implement addressability,[23/] and consequently exempted those systems from complying with the buy-through prohibitions.[24/] Even addressable systems, however, may face difficulty complying with those prohibitions in a manner consistent with the separate statutory mandate for compatibility between cable systems and consumer electronics equipment.[25/]

In most instances, compliance with the buy-through provisions will have the effect of disabling the advanced features of subscribers' consumer electronics equipment because compliance requires addressability and addressability utilizes signal scrambling to prevent theft of service. The scrambling of signals, in turn, interferes with the "picture-in-picture" feature of advanced television sets and prevents a subscriber from watching one program service while taping another (assuming

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[23/] Senate Report at 77.

[24/] 47 U.S.C. § 543(b)(8)(B).

[25/] 47 U.S.C. § 544A.

the signals of both services are scrambled).[26/] Given Congress's concern with ensuring compatibility between cable systems and consumer electronics equipment, the Commission should exempt addressable systems from the buy-through prohibitions at least until the rules governing equipment compatibility have become effective.[27/] It makes little sense to compel cable systems to comply with a policy that disables desirable features of television sets and video cassette recorders, while at the same time promulgating regulations to "assure compatibility" between cable systems and home electronics equipment.

[26/] To the extent that certain channels on a cable system remain unscrambled, a subscriber could watch an unscrambled channel while taping a scrambled channel or *vice versa*. Services offered on an *a la carte* basis must be scrambled to control access to those services.

Consumers may react strongly to a regulatory requirement that, because it mandates the use of addressable technology, interferes with the advanced features of their consumer electronics equipment. In Huntington, New York, Cablevision scrambled all of the signals on its system (other than broadcast signals and access channels) in order to provide service on an *a la carte* basis using addressable technology. In the face of opposition from subscribers whose televisions and video cassette recorders were affected, the company is considering unscrambling the signals that had previously been unscrambled and scrambling only those signals added to the system after a certain date.

[27/] A dual-output converter would descramble two signals simultaneously, enabling a subscriber to tape and watch both scrambled signals at the same time and to utilize at least some picture-in-picture capability. Dual-output converters are not yet commercially available, however, and will be more costly than existing addressable converters.

B. Cable Systems That Utilize Two Separate Cables for the Delivery of Programming Should Not Be Subject to the Buy-Through Prohibition

Cable systems are exempted from the buy-through prohibitions if, due to "technological limitations" other than the lack of addressability, they are unable to comply with the Act.[28/] The Notice requests comment on the types of cable system design that would impede compliance with the statute and so qualify as a "technological limitation."[29/]

The design of Cablevision's Boston system poses a technological limitation to compliance with the buy-through prohibitions. That system employs two different cables to provide cable service. The "A" cable is used to provide basic service; the "B" cable transmits the intermediate tier of programming and the services offered on a per channel or per program basis. The converter furnished to basic ("A" cable) subscribers does not have descrambling capability.

A basic subscriber who requested an *a la carte* service would have to be connected to the "B" cable and provided with a significantly more expensive converter capable of descrambling the signals of premium channels. It is unlikely, however, that the additional revenue to Cablevision from the purchase of a single premium channel would enable the company to recoup the costs associated with the new installation and the more sophisticated converter, costs that are currently recovered from

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[28/] 47 U.S.C. § 543(b)(8)(B).

[29/] Notice at ¶ 5.

"B" cable subscribers because they also purchase the intermediate tier delivered over the "B" cable.

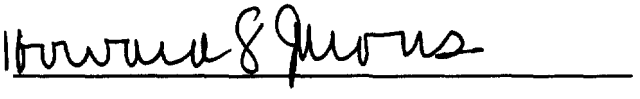
Such a situation is precisely what Congress had in mind when it chose to exempt systems that faced technological limitations other than the lack of addressability. The Commission should define "technological limitations" to include "dual-cable" systems.

Conclusion

For the foregoing reasons, the Commission's buy-through regulations should not prohibit discounting of programming offered on an *a la carte* basis or reasonable discounts for per channel or per program offerings for subscribers who purchase intermediate tiers of programming. The Commission should address the conflict between the buy-through prohibitions and the statute's equipment compatibility requirement, and exempt "dual cable" systems from those prohibitions.

Respectfully submitted,

CABLEVISION SYSTEMS CORPORATION



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